

# U.S. Department of Labor

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**Issue Date: 23 June 2008**

CASE NO.: 2005-STA-00027

In the Matter of

**CHARLES A. WILLIAMS,**  
Complainant,

v.

**CAPITOL ENTERTAINMENT SERVICES, INC.,**  
Respondent.

## **RECOMMENDED DECISION AND ORDER ON REMAND**

This matter arises under the employee protection provisions of the Surface Transportation Assistance Act, 49 U.S.C. § 31105 (“the Act” hereinafter), and implementing regulations set forth at 29 C.F.R. part 1978. The pertinent provisions of the Act prohibit the discharge, discipline, or discrimination of employees who refuse to operate a commercial motor vehicle when such operation constitutes a violation of federal motor vehicle safety regulations or because of reasonable apprehension of serious injury due to unsafe conditions or health matters.

### **I. PROCEDURAL BACKGROUND**

Charles Williams (“Complainant” hereinafter) was employed by Capitol Entertainment Services, Inc. (“Respondent” or “CES” hereinafter) from approximately September 1, 2004 until he was terminated on or about September 27, 2004. On November 19, 2004, Complainant filed a complaint with the Department of Labor’s Office of Occupational Safety and Health Administration (“OSHA” hereinafter) alleging that he had been discriminated against by Respondent for engaging in whistle blowing activities. After conducting an investigation, OSHA issued the findings of the Secretary on March 9, 2005, which concluded that Complainant’s discharge was not related to protected activity.

On March 29, 2005, Complainant filed an appeal of that determination with the Office of Administrative Law Judges (“OALJ” hereinafter), and the case was thereafter assigned to me for hearing. I held a hearing in the matter on Thursday, April 28, 2005 in New York, New York. On August 4, 2005, I issued a Recommended Decision and Order, in which I recommended dismissing Complainant’s complaint. In its final decision and Order issued December 31, 2007, the Administrative Review Board (“ARB” hereinafter) affirmed in part and remanded in part my Recommended Decision and Order. In remanding the Decision, the ARB directed me to address whether Complainant’s reports regarding drivers’ maintenance of defect records constituted protected activity, and if so, whether

Complainant's termination was related to the protected activity in violation of the STAA. Because the ARB otherwise affirmed my initial Decision and Order, I hereby adopt the Findings of Fact and Conclusions of Law as set forth therein, except for the revisions and additions set forth herein, which supplement the initial Decision and Order.

## **II. FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON REMAND**

### **A. The Decision and Order of the ARB Affirming my Findings**

#### **Complaints about unsafe conditions**

The ARB affirmed my findings that Complainant engaged in protected activity by complaining about the safety of tires and an exhaust system on a bus. The ARB corrected my application of 49 U.S.C.A. § 31105(a)(1)(B)(ii), noting that that section of the Act applies to an employee's refusal to operate a vehicle because of a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition. Complainant, a mechanic, did not refuse to operate the vehicle, but rather refused to clear it for operation. Although the ARB found my misapplication of the statute to be a harmless error, I find it appropriate here to correct my original Recommended Decision and Order to reflect compliance with the correct legal standard. Accordingly, I find that Complainant's complaints about the condition of the bus constitute protected activity under 49 U.S.C.A. § 31105(a)(1)(A).

#### **Causation**

The ARB affirmed my determination that Complainant's termination was not due to his protected activity regarding the safety of buses due to maintenance and mechanical issues.

#### **Requests for Inventory and Equipment**

The ARB affirmed my findings that Complainant's complaints about inventory and equipment were not protected activity.

### **B. Issues on Remand from the ARB**

#### **Completion of "Defect Reports"**

The ARB found that I had neglected to fully consider whether Complainant's complaints about the maintenance of driver "defect reports" were protected activity under the STAA. The ARB remanded the case to me to determine whether Complainant's involvement with the driver defect reports constituted protected activity, and if so, whether Complainant's termination was related to that activity in violation of the Act. Pertinent portions of the testimony adduced at hearing, as well as other evidence, is duplicated herein, but I have considered all of the record in reaching my determinations on these issues.

### *1. Summary of the Evidence*

At the hearing, Complainant testified that he was hired September 1, 2004 as Director of Maintenance for Respondent and was responsible to establish a preventative maintenance program for Respondent's buses. From the beginning of his employment, Complainant observed that the bus drivers did not keep records of necessary repairs and maintenance, or "defect books" on Respondent's buses, as required by Federal Motor Carrier Safety Administration ("FMCSA"). Within a short time on the job, Complainant had secured books to be maintained by drivers, but he observed that the drivers were not correctly recording defects. Complainant was not responsible for supervising drivers, and he advised Respondent's owner, Mr. Best, about the problem. Mr. Best told Complainant that he "was coming on too strong" and suggested that he back off since the operation was just getting going. Complainant observed instances where defects were recorded by drivers, and he completed repairs. At other times, he observed defects that were not recorded. He saw no indication that the drivers kept better records during the course of his employment with Employer, which lasted 27 days.

Complainant also advised Mr. Best that the company did not have necessary materials and equipment to make mechanical repairs and maintenance. The buses were kept at a lot owned by MCT, which had a shop area. Complainant did not know if Respondent had an arrangement with any other company for the maintenance of its buses. Complainant stated that Respondent bought some used buses from ABC bus company, which provided some kind of inspection. Complainant did not believe that Respondent conducted its own inspection of these buses.

Complainant observed problems with vehicle maintenance that he pointed out to Mr. Best, who, in Complainant's opinion, did not address the defects properly. Complainant proposed a schedule of preventative maintenance, but he wasn't in the job long enough to implement it. On Friday, September 24, 2005, Complainant advised Mrs. Best that one of the buses should be grounded because he believed the tires were bald. Mr. Best called him by telephone and directed him to measure the tread on the tires. He did so, and Mr. Best then told him to wait for a company to come to the lot to change the tires. The following Monday morning, he was fired. He remained on site because the owner of MCT Tours, Mrs. Thomas, hired him to help her with some repair work. Complainant admitted that Mr. Best had initiated one discussion about his performance, but Complainant felt that Mr. Best's concerns were "misplaced".

Mr. Josh Best is employed by Respondent as a bus driver. His duties include inspecting buses before they go out in the morning. He checks the fluids, lights, signals, and other obvious operations of the buses. He also reviews drivers' reports to see if a specific defect or mechanical concern was noted from the previous trip. On the first day the buses were dispatched to school, Complainant told Mr. Josh Best that he would be doing the pre-trip inspection. Mr. Josh Best recalled telling Complainant that a wiper blade needed replacement, but Complainant did not replace it. Mr. Josh Best eventually made the repair, as well as other repairs.

At the time of the hearing, Mr. Lowell Bolden had worked for Respondent on a part time basis for about three years. His job involves keeping drivers on schedule, and he drives buses at times when necessary. He helps out with pre-trip inspections and gets buses ready in the

morning. Mr. Bolden observed Complainant at the work site, but was not aware of many repairs that he made. Mr. Bolden was familiar with the driver defect report, and uses it.

Mr. John Best ("Mr. Best") is the president of CES, which has been in business for twenty six (26) years. In late August 2004, his company won a contract to provide bus services for a school district. The award was made days before performance was expected to begin, and Mr. Best immediately undertook to purchase buses from ABC bus company, which provides an inspection and certification for its vehicles. Meanwhile, he arranged with other bus companies to subcontract their buses until his purchases could be delivered. He also needed a mechanic to fulfill the contract requirements, and a colleague recommended Complainant. Mr. Best hired him as a mechanic, but also anticipated that, in light of the expansion of his operations, Mr. Williams could devise a repair and maintenance system and a training schedule to assure compliance with government regulations. During Complainant's job interview Mr. Best disclosed his expectation that his hire would attempt to repair deficiencies before resorting to replacing parts. Mr. Best also expected his new mechanic to work only on buses authorized by Employer, and not do side jobs at the work site, and he made it clear that his salary covered all work that he was directed to perform.

After Complainant was hired, Mr. Best learned that he was working for his co-tenant's company and charging her for the work without clearing it with Mr. Best. Mr. Best did not reprimand Complainant, but instead generated a memorandum to formalize his policy. Mr. Best also described how Complainant asked for a computer and software program to investigate the purchase of a lift and an inventory of tires. Mr. Best bought the computer and a maintenance program, but told Complainant that the company did not have the resources or need for the other items. Mr. Best also became concerned that Complainant had arranged the delivery of a "Bobcat" which he had not authorized, and did not need. Mr. Best observed that Complainant was often absent from the premises, and when there, did not appear to be doing much mechanical work. He also had become aware of some problems other people had experienced with Complainant. Mr. Best decided he needed to speak with Complainant about his poor performance.

Mr. Best recalled that Complainant reported mechanical deficiencies that he agreed needed to be addressed, such as faulty brake lights and faulty brakes. When Complainant told him that he needed driver's defect books, he ordered them. Mr. Best needed to account for every dollar that the company spent, and felt he could not give Complainant a repair maintenance budget. Employer subleases the facility from MCT Tours, and has the use of its equipment. The companies also share buses. Mr. Best denied that he did not have necessary equipment because he could use MCT Tours' equipment, or send his buses to other companies for work that his mechanics could not perform. Mr. Best was aware that drivers did not always keep reports properly, but as time went on, that problem was corrected.

Mr. Best admitted that Complainant had performed at least one major repair on an exhaust system. He also recalled that Mr. Williams had advised him that tires were bald, and he acknowledged that bald tires are a safety issue. He immediately looked at his buses to inspect the tires, and contacted his tire contractor to service the tires.

Respondent's offices are not physically located at the site where Complainant worked, but Mr. Best communicated with Mr. Williams by telephone, and he stopped by the shop frequently. Mr. Best provided Complainant with a mobile phone to use to contact him and conduct business. He also provided him an apartment, with rent deferred as a loan. Mr. Best also gave Complainant some money to rent a truck and move his tools. Mr. Best at times gave Mr. Williams cash. Mr. Best denied that he wanted Mr. Williams to be a resident of the District of Columbia to fulfill contract requirements, and stated that he had adequate employees who live in the District to meet that expectation.

Mr. Best concluded that Complainant would not improve his performance. Mr. Best "just thought for some reason Mr. Williams didn't want to produce. He would get in his car and leave. I just thought he wanted to be a safety officer. He wanted to be a big supervisor..." Tr. at 300.

## *2. Statement of the Law*

49 U.S.C.A. § 31105(a)(1) ("the Act"), provides that an employer may not "discharge," "discipline" or "discriminate" against an employee-operator of a commercial motor vehicle "regarding pay, terms, or privileges of employment" because the employee has engaged in certain protected activity. The protected activity includes making a complaint "related to a violation of a commercial motor vehicle safety regulation, standard, or order." § 31105(a)(1)(A). Internal complaints to management are protected under the STAA. Reed v. National Minerals Corp., Case No. 91-STA-34, Sec., Dec. and Order, slip op. at 4, July 24, 1992. A "commercial motor vehicle" includes "any self-propelled...vehicle used on the highways in commerce principally to transport passengers or cargo" with a gross vehicle weight rating of ten thousand or more pounds. 49 U.S.C.A. § 31101(1).

The Act prohibits discriminating against an employee who "has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order..." 49 U.S.C. § 31105(a)(1)(A). A communication about the violation to a supervisor is considered protected activity. Harrison v. Roadway Express, Inc., ARB No. 00-048, ALJ No. 1999 STA 37 (ARB Dec. 31, 2002); Goggin v. Administrative Review Board, No. 97-4340 (6th Cir. Jan. 15, 1999)(unpublished) (available at 1999 WL 68694) (case below 1996-STA-25) (Internal complaints to management are protected activity under the whistleblower provision of the STAA).

The United States Department of Transportation, through its agency the Federal Motor Carrier Safety Administration ("FMCSA"), has promulgated regulations that apply to all employers, employees, and commercial motor vehicles which transport property or passengers in interstate commerce. 49 C.F.R. part 390, Subpart B. The regulations provide a specific exception from the rules for school bus operations, "unless otherwise specifically provided". 49 C.F.R. § 390.3(f)(1). A school bus operation is defined as the use of a school bus to transport only school children and or school personnel from home to school and from school to home. 49 C.F.R. § 390.5.

Despite this exception, motor carriers must adhere to all licensing and other requirements set forth for drivers in part 325 of subchapter A and any subchapter of Part 390 of the Federal Motor Carrier Safety Regulations (“FMCSR”). 49 C.F.R. § 390.11. Section 396.11 of the FMCSR mandates that drivers prepare a written report at the end of the work day that identifies the vehicle and lists any defect or deficiency discovered by or reported to the driver. The regulations provide instructions for the content of reports, the manner in which such documents must be retained; and how corrective action must be taken and reported. 49 C.F.R. §§ 396.11(b) and (c). 49 C.F.R. § 396.13 requires drivers to conduct a mandatory inspection of a vehicle before driving it, and to review the last driver vehicle inspection report.

### 3. *Discussion*

It is uncontroverted that Complainant was terminated from his employment with Respondent on September 27, 2004, and consequently suffered an adverse employment action. It is also not disputed that Complainant advised Respondent’s owner that it was not in compliance with the FMCSR requirement that drivers document mechanical defects or necessary vehicle maintenance in reports that are required to be kept in the vehicles. In consideration of the FMCSR, I find that the “defect report” that Complainant discussed is the driver vehicle inspection report that is the subject of 49 C.F.R. § 396.11. I further find that Complainant engaged in protected activity when he advised Respondent that such reports must be prepared and maintained. The STAA whistleblower provision protection extends beyond just complaints relating to federal motor vehicle safety regulations, and include any relevant motor vehicle regulation, standard or order. See, Chapman v. Heartland Express of Iowa, ARB No. 02 030, ALJ No. 2001 STA 35 (ARB Aug. 28, 2003) (as reissued under Sept. 9, 2003 errata). As I have found that Respondent acknowledged this complaint, I must determine whether Complainant’s termination was causally related to this protected activity.

Respondent has met its burden of articulating a legitimate reason for terminating Complainant’s employment by pointing to Complainant’s poor performance and unacceptable conduct. I adopt again herein the rationale that I provided in my initial Decision and Order, where I accorded full credence to Mr. Best’s explanations for his decision to discharge Complainant from his employment. Complainant has not presented any evidence that demonstrates that this articulated reason was pretext for firing him for making complaints about the need for “defect reports”. Complainant raised the issue early in his brief employment with Respondent. Mr. Best credibly testified, and Complainant concurred, that he ordered books for the purpose of maintaining those reports when Complainant brought the subject to his attention. Mr. Josh Best and Mr. Bolden testified that they complete pre-trip inspections and document maintenance and repair requirements in inspection reports. Complainant asserted that the books were not properly kept and Mr. Best agreed that drivers did not always keep reports properly. However, Complainant’s employment with Respondent was of very brief duration, and I accord weight to Mr. Best’s assertion that as time went on, that problem was corrected. I find no temporal or other connection between Complainant’s discussions about “defect reports” and his later discharge. Complainant has not proven by a preponderance of the evidence that the employer’s articulated legitimate reason is pretext for discrimination. Moon v. Transport Drivers, Inc., 836 F. 2d 226 (6<sup>th</sup> Cir. 1987); Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

C. Other Potential Protected Activities

My review of my initial Recommend Decision and Order reflects that Complainant raised issues that could be construed as other protected activity. Although not directed by the ARB to address these issues, I find it appropriate to do so in the interest of thoroughness.

1. *Inspection of Recently Purchased Buses*

The record establishes that Respondent bought some used buses from ABC bus company shortly after Complainant joined the company. Complainant did not believe that Respondent conducted its own inspection of these buses, although he acknowledged that the bus dealer provided inspection documents. Mr. Best testified that the buses were properly inspected. Complainant insinuated that Respondent engaged in some wrongdoing by not conducting its own inspection. It has been determined that the statutory provision covering a “federal motor safety violation” as cited by 49 U.S.C. § 31105 incorporates the laws of the jurisdiction in which the vehicle is being operated. *See* 49 C.F.R. § 392.2. Beveridge v. Waste Stream Environmental, Inc., 97-STA-15 (ARB Dec. 23, 1997). However, Complainant did not cite to any local, state or federal statute, regulation, or ordinance that would have required a second inspection. Moreover, the record does not demonstrate that Complainant made a complaint about this issue, or in any other way brought it to Respondent’s attention. I find that Complainant has not established that his concerns about a subsequent inspection of the newly acquired vehicles constitute protected activity.

2. *Complaints to State Authorities*

Filing a complaint with a state department of transportation or other authority constitutes protected activity under the STAA. *See*, Ass’t Sec’y & Dougherty v. Bjarne Skjetne, Jr. d/b/a Bud’s Bus Service, 94-STA-17 (Sec’y Mar. 16, 1995); Nix v. Nehi-RC Bottling Co., Inc., 84-STA-1 (Sec’y July 13, 1984). In the instant matter, Complainant asserted that he filed complaints with the State of Maryland Occupational Safety and Health Administration, in which he raised his concerns about the work site that Respondent shared with MCT Tours. Tr. at 92-96. The record reflects correspondence from the State of Maryland Department of Labor, Licensing and Regulation dated November 19, 2004 directed to Complainant, and to Respondent and MCT Tours. CX 1 and CX 2, respectively. Complainant testified that he filled out a complaint form, but did not have a copy of the complaint he made to the State. Tr. at 92. Correspondence dated January 25, 2005 advised Complainant that the State had no jurisdiction over Respondent, which had moved.

Complainant was unable to say when he filed his complaints with the State. There is no evidence that Respondent was aware that Complainant made these complaints during his tenure with CES. I note that the correspondence from the state bears the same date as Complainant’s complaint to OSHA of violations of the STAA. Although the complaints with the State constitute protected activity, Complainant’s last day of employment with Respondent was September 27, 2004. Accordingly, I find no nexus between the complaints with the State of Maryland, and the adverse action.

### III. CONCLUSION

Complainant's complaints about the need to keep reports of vehicle inspections constitute protected activity under the STAA. However, Complainant has not demonstrated a link between that protected activity and his termination, or any other adverse employment action. Complainant has failed to establish that Respondent was required to make a second inspection of newly acquired vehicles, and failed to demonstrate that he told Respondent that he believed such inspections were necessary. Accordingly, I find that he did not engage in protected activity with regard to this issue. Although Complainant's complaints to the State of Maryland constitute protected activity, I found no evidence to infer nexus to the adverse action that occurred when he was discharged on September 27, 2004.

Accordingly, I find that Complainant is not entitled to the relief he seeks under the Act.

### **RECOMMENDED ORDER**

It is hereby recommended that the case of Complainant CHARLES A. WILLIAMS, upon remand, be DISMISSED.

A

Janice K. Bullard  
Administrative Law Judge

Cherry Hill, New Jersey

**NOTICE OF REVIEW:** The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. *See* 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.